

Claimant was injured at work when a co-worker discharged air from a high pressure air tank at claimant as he bent over to pick up a tire. The pressurized air entered claimant's rectum causing a ruptured bowel and air in his abdomen. Respondent denied claimant's accidental injury arose out of and in the course of his employment because claimant was engaged in horseplay when the incident occurred. Claimant argued that he was performing his job duties when the incident happened and was neither engaged in horseplay nor had been engaged in horseplay. The Administrative Law Judge (ALJ) found that claimant had suffered personal injury by accident which arose out of and in the course of his employment with respondent. The ALJ determined claimant was not participating

in horseplay when the incident occurred. Consequently, the ALJ found claimant suffered a 12 percent whole person functional impairment.

Respondent requests review of whether claimant's accidental injury arose out of and in the course of employment with respondent. Respondent argues that claimant and his son were involved in horseplay when the injury occurred and the claim should be denied.

Claimant argues the functional impairment should be increased to 24 percent as his medical expert offered the only impairment rating, otherwise the ALJ's Award should be affirmed.

The issues raised on review before the Board include: (1) whether claimant suffered accidental injury arising out of and in the course of employment, specifically whether he was engaged in horseplay when the incident occurred; and (2) the nature and extent of claimant's functional impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant is employed as a truck driver for respondent. Claimant drove a semi-truck as his main job and then he also worked as a mechanic. He would also operate equipment such as track hoes and loaders. As a mechanic, his job requires him to change fuel lines, weld and change tires on trucks and trailers.

On Saturday, October 17, 2009, claimant had been working since 8 a.m. with his son, Kurt Coon a co-employee, changing tires on trailers. Claimant would take a wheel and rim off the trailer and then break down the tire from the rim in order to remove the tire. Michael Sobba and Daryl Coble were also in the area engaging in conversation with claimant and his son.

Claimant described the accident:

Q. Let's start with that morning. Tell me what happened leading up to the accident and the accident in your own words.

A. We changed them two tires on my trailer. I pulled it out, backed his trailer that he was pulling in. We changed six or seven of them, I believe, at the time. And we went to -- I believe I went -- we were getting ready to air up the other tire. We'd already put the new one on the wheel. I went over -- bent over to pick the tire and wheel up off the ground so we could air it up, and that's when I got hit with the bead blaster, which is a tank that holds air in it, and you can squirt that in the tire and help

air it up so it'll seat up in the wheel. And about the time the air come out is when I bent over to pick the tire and wheel up and it shot up in my rectum.¹

The sealing of the tire required a very strong blast of pressurized air in order to quickly seat the tire. As previously noted, claimant was bending over to pick up the tire and wheel when Kurt Coon grabbed the bead blaster and shot air from two or three feet away at claimant. Claimant was dressed in underwear and blue jeans. After the incident claimant went to the bathroom and passed out so his son called 911 for an ambulance. Claimant then went to his truck.

A policeman from Ark City Police Department came to the scene where claimant was sitting in his truck. Officer Daniel Huntley took a statement from both claimant and his son. The Officer's report indicated that Kurt Coon stated that he and his father were goofing off when the air hose inadvertently got shoved up the father's rectum while air was discharged. But when questioned about taking the report, Officer Huntley explained that it was only reported that air got blown up the rectum and he assumed the air hose had been inserted in claimant's rectum. Officer Huntley testified:

Q. Okay. You didn't receive any information either from your investigation or from witness statements to indicate otherwise? When the statement here was given that -- I'm sorry to be kind of graphic, that the air hose quote, inadvertently got shoved up the father's rectum, it was your understanding that that is a literal description of what had happened or is that not literally what you understood to have happened? That's a horrible question.

A. Basically what was reported to me was that the air got blown up the rectum. And, you know, maybe I based it a little bit on assumption, but, you know, with his pants up and everything, you know, and with the industrial air hose, my thought process was it had to be placed inside the clothing to get the air blown up.

Q. Okay. Do you recall, did anybody actually tell you that literally that's what had happened or was that --

A. All I was told is that air had gotten blown up his rectum.²

Claimant was transported to South Central Kansas Regional Medical Center's emergency room. The triage nurse wrote: "He was messing around with a large air tank and a friend shot air into patient's rectal area." Claimant had a CT scan of his abdomen which revealed air in the retroperitoneal space so surgery was performed by Dr. David Acuna. The surgery involved a rectosigmoid resection which is removing part of the bowel.

¹ Claimant's Depo. at 20.

² Huntley Depo. at 17-18.

The doctor removed 12 inches of claimant's large colon and also 3 inches of his rectum. Claimant followed-up with Dr. Acuna on October 26, 2009, for removal of staples.

Michael Sobba and Daryl Coble were at the worksite talking to claimant while waiting to go to lunch with Brian Wells, respondent's owner. Mr. Sobba testified that he saw the incident and claimant's son had the pipe about a foot away from claimant when he released the pressurized air towards claimant's backside. Claimant was bent over working when his son released the air. Mr. Sobba further testified that the apparatus never touched claimant. And claimant did not have his pants down "mooning" his son when the incident occurred. Daryl Coble prepared a written statement which indicated claimant was bent over working when his son came up behind him and opened the valve releasing the pressurized air when he was about a foot away from claimant. The force of the air lifted claimant off the floor and knocked him down.³

Kurt Coon, claimant's son and co-worker, testified that on the morning of the incident he, Mr. Sobba, Mr. Coble and his father had been engaged in playful banter. As a joke Mr. Coon was going to release the air and knock claimant's hat off but when turned the valve to release the air, his father bent over and the air knocked him over onto the floor.

After the surgery, Dr. Wade Turner, board certified in internal medicine, provided postoperative care for claimant and first examined and evaluated claimant on October 26, 2009. Upon physical examination of claimant's surgical wounds, the doctor opined the wounds were healing. Claimant returned for a follow-up visit on October 30, 2009, to have his stitches removed and recheck his blood pressure due to it being low. Claimant did not complain about having the inability to control his bowels during the first two visits with Dr. Turner.

On November 12, 2009, claimant had complaints of pain in the lower right quadrant of his abdomen. He was diagnosed with an abscess and then he was taken to the radiology department. Dr. Schmaltz used a CT for guidance in placing a catheter in the abscess in order for it to drain.

Claimant returned for a follow-up visit on November 19, 2009, and he mentioned that his pain had decreased. Dr. Turner advised claimant to quit flushing the catheter. Claimant did not mention anything to Dr. Turner regarding the problem of not being able to control his bowels. The next day Dr. Turner removed the catheter. Due to complaints of pain in his right lower quadrant and discomfort when he tried to lift his leg, claimant returned to see Dr. Turner on November 30, 2009. The doctor opined that claimant was still healing from the abscess.

³ Sobba Depo., Ex. 1.

On November 22, 2010, claimant returned to see Dr. Turner. The doctor diagnosed claimant with coronary artery disease, hyperlipidemia and some bowel incontinence. The doctor noted that claimant had a ruptured colon last spring and unfortunately was left with some minor leakage at the time. Dr. Turner was willing to send claimant to a specialist but claimant declined the treatment.

Dr. Turner was provided a copy of the *AMA Guides*⁴ the day of his deposition but noted that he had never before given a rating based upon the *AMA Guides*. Dr. Turner then agreed claimant's condition appeared to be addressed by Class 1 in Table 3 on Page 241 of the *AMA Guides*, which provides a rating from 0 to 9 percent. On cross-examination Dr. Turner agreed that he would defer to any other physician regarding claimant's functional impairment. Dr. Turner testified:

Q. You mentioned earlier you know that there are physicians that make more of a practice in providing the rating impairment opinions. That being the case and given the fact that you haven't, you know, familiarized yourself with the Fourth Edition of the *AMA Guides*, would you defer to another physician's opinion regarding the permanent partial impairment Mr. Coon may have subject to the *Guides*?

A. Yes.⁵

Dr. Pedro Murati, board certified in physical medicine and rehabilitation, examined claimant on July 12, 2010, at the request of claimant's attorney. Claimant had complaints of occasional bowel incontinence, urgency to go to the bathroom and had problems with certain foods which caused bowel problems. The doctor reviewed claimant's medical records and also took a history from him. Upon physical examination, Dr. Murati found claimant had a healed scar in the anus, enlarged prostate and excessive amounts of scar tissue. Dr. Murati diagnosed claimant with occasional bowel incontinence and status post repair of the colon. The doctor opined that claimant's diagnosis was a direct result of his work-related injury that occurred on October 17, 2009. Dr. Murati recommended that claimant have close access to bathroom facilities. Based upon the *AMA Guides*, the doctor concluded claimant had a 24 percent whole person functional impairment.

Dr. Murati opined that the excessive scarring that claimant had in his rectum was due to the initial blast of air which broke the skin to get into the retroperitoneum.

Dr. Murati testified:

⁴ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *AMA Guides* unless otherwise noted.

⁵ Turner Depo. at 37-38.

Q. Doctor, this urgency and occasional bowel incontinence that you took as a history from him, was that -- would that have been something that most likely would have began shortly after the surgery, the removal of the lower intestine?

A. Well, he's -- he said that -- when you have a case like this, you don't have them eating solids for quite awhile, so it's after they go home that it starts. They're mostly put on a liquid diet, they start them on a liquid diet to make sure everything is working fine, and then they slowly introduce solids.⁶

The doctor further opined that there had to be high pressured air to perforate the sigmoid and it had to be close to it.

Initially, respondent argues claimant was engaged in horseplay when the incident occurred and the claim should be denied. The Board disagrees. All the witnesses to the incident agree claimant was performing his job duties when the pressurized blast of air was directed at him. Claimant was not participating in horseplay when the incident occurred. An injury to a nonparticipating employee from workplace horseplay arises out of employment and is compensable under the Kansas Workers Compensation Act.⁷

The Board is mindful of Officer Huntley's testimony but, like the ALJ, finds that an opinion admittedly based upon assumption and not fact is unpersuasive when compared with the testimony of the eye-witnesses. Moreover, the officer referred to an air hose when the actual apparatus was not a hose but instead the pressurized air was released through a pipe that was 15 inches long and 2 inches in diameter.⁸ The Board affirms the ALJ's finding claimant suffered accidental injury arising out of and in the course of his employment.

The nature and extent of disability is limited to claimant's functional impairment.⁹ Functional impairment is defined by K.S.A. 44-510e(a), as follows:

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

⁶ Murati Depo. at 23.

⁷ *Coleman v. Armour Swift-Eckrich*, 281 Kan. 381, Syl., 130 P.3d 111 (2006).

⁸ Sobba Depo. at 13-14.

⁹ Claimant returned to work for respondent making 90 percent or more of his pre-injury wage. Pursuant to K.S.A. 44-510e(a) claimant's permanent partial general disability compensation is limited to his percentage of functional impairment.

The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.¹⁰ It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony with the testimony of the claimant and others in making a determination on the issue of disability.

Dr. Murati provided a rating of 24 percent and Dr. Turner simply agreed that claimant fit under a table of the *AMA Guides* that provided a rating from 0 to 9 percent. But Dr. Turner further agreed it was the first time he had seen the *AMA Guides* and later agreed that he would defer to any other physician providing an impairment rating. Moreover, Dr. Turner testified:

Q. Okay. What I'm going to ask you is: Do you have an opinion -- or do you feel you can offer an opinion within a reasonable degree of medical probability or certainty as to what type of impairment rating Mr. Coon would qualify for, if any, under the Fourth Edition of the *AMA Guides*?

A. I don't.¹¹

Consequently, the Board adopts the rating provided by Dr. Murati that claimant suffered a 24 percent whole person functional impairment.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹² Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge John D. Clark dated December 5, 2011, is modified to reflect claimant suffered a 24 percent whole person functional impairment and is affirmed in all other respects.

Claimant is entitled to 8 weeks of temporary total disability compensation at the rate of \$546 per week or \$4,368 followed by 99.60 weeks of permanent partial disability compensation at the rate of \$546 per week or \$54,381.60 for a 24 percent functional disability, making a total award of \$58,749.60, which is ordered paid in one lump sum less amounts previously paid.

¹⁰ *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

¹¹ Turner Depo. at 34.

¹² K.S.A. 2010 Supp. 44-555c(k).

IT IS SO ORDERED.

Dated this 26th day of April, 2012.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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John D. Clark, Administrative Law Judge